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IN THE

Supreme Court of the United States

October Term, 1965

No. 3

WILLIAM ALBERTSON and
ROSCOE QUINCY PROCTOR,
Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INDEX

Citations

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I. The purpose of the member registration requirement.

Our principal brief (pp. 15-41) argued that the member registration requirement of the Act violates the privilege against self-incrimination, due process and the First Amendment. In connection with the constitutional challenge on these grounds, the brief showed that the requirement lacks a governmental purpose. To compel self-registration as members of the Communist Party by persons whom the Board has found to be members performs no disclosure function (Pet. Br. 33-34, 38-39, 41), does not aid in law enforcement (Pet. Br. 26-27, 30), and serves no other public interest.

In reply, the government states (Br. 22) that, "The sole purpose of registration, we submit, is to place the name of the registrant on the public list which the Attorney General is required to keep pursuant to section 9(a) of the Act."

The first fallacy of this theory is that its premise is false. Section 9(a) does *not* require the Attorney General to keep a list of member-registrants. The required list is confined to *organizations* which register. All that section 9(a) calls upon the Attorney General to keep with respect to individuals is "the registration statements filed by [them] under section 8." Congress could, of course, have provided for the filing of these statements without requiring registration. As the government acknowledges, therefore, "the act of 'registration' per se is not justified by the need for [a registration statement]."[1] And nothing in the Act requires the registration *statement* to call upon the signatory to admit membership in the Communist Party. Hence, the admission of membership in the Communist Party which the act of registration exacts has nothing to do with the performance of the duties of the Attorney General under section 9(a).

Second, even if Congress had thought it desirable to make provision for what the government calls "centralizing the roster" (Br. 30, n. 15) it could easily have done so by a method that would have avoided the most obvious constitutional objections to compulsory self-registration. For, as the government concedes (Br. 22), "Congress could, of course, have achieved the same result by empowering the Board to register all those found by it to be members." Finally, it is preposterous to suppose that the Act's fantastic cumulative penalties for failure to register were imposed merely to accomplish the insignificant clerical objective that the government attributes to Congress.

Elsewhere in its brief, the government suggests three other possible Congressional purposes for the member registration requirement.

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[1] In fact, the Act makes the duty to file the statement ancillary to the registration requirement so that the invalidity of the latter dispenses with the former. See Pet. Br. 34 and *infra*, pp. 9-10.

First, it is said (Br. 32) that compulsory self-registration will promote voluntary compliance since persons would "not be encouraged to register" if they "could avoid any personal involvement" by waiting until the Board found them to be members. The notion is fanciful. It is also unrealistic, as is shown by the fact that not a single person has registered (either voluntarily or pursuant to Board order) as a member of the Communist Party in the four years of its non-compliance with the final registration order against it. Moreover, the argument contradicts the contention, running throughout the government's brief, that registration is "a neutral act" (Br. 11) of no consequence to the registrant. In fact, what the government calls "personal involvement" is its euphemism for self-incrimination, self-defamation and foreswearing—the very features that make compulsory self-registration unconstitutional.

Next, the government argues (p. 32) that "the registration procedure is a means of obtaining from the registrant responses to the inquiries on the registration statement." But the government nullifies its own argument by conceding (*ibid.*) the obvious fact that these responses could have been obtained just as well without imposing the registration requirement.

Finally, the government suggests (Br. 33) that "personal registration has the virtue of keeping the records current." This is not so for two reasons. First, the duty of an individual under section 8 is at an end once he registers and files a registration statement. The Act contains no provision for keeping information with respect to member-registrants current.[2] Contrary to the government's assertion (*ibid.*) the Attorney General is therefore powerless to require periodic re-registration or notification of a change of address. Second, Congress could, of course, have required persons found by the Board to be members of a

[2] Unlike the case of registered organizations which are required to file annual reports. Sec. 7(c).

Communist-action organization to furnish the Attorney General with their current addresses, without also requiring them to register as members of the organization.[3]

The government's inability to unearth a legitimate purpose for the member registration requirement confirms petitioners' position that there is none. The plain fact is that the purpose of the requirement is not to get voluntary compliance, or a centralized roster of Communists, or current information about them, but to "get" the Communists themselves. This is done by offering them the alternatives of forfeiting their human dignity and self respect by registering or incurring life imprisonment for refusal to register. Born of the savage anti-Communist hysteria of the early 1950's the device of compulsory self-registration bears the imprint of its time and admits of no other purpose.

It is against this background that the government's defense of the member registration requirement must be considered.

II. The privilege against self-incrimination.

A. *Registration.*

1. *Prematurity.*

The government now concedes (Br. 6) that "to the extent petitioners contend that any form of compulsory registration adequate to satisfy the standards of section 8 would violate the Fifth Amendment privilege, their claim is now ripe for adjudication." But it adds (*ibid.*) that, "Insofar, however, as they challenge any particular inquiry made on the Registration Form . . . their contention is premature." As will be seen, neither the Board's orders nor the registration form IS-52a[4] make demands beyond

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[3] The address requirement would, of course, be subject to a claim of the privilege against self-incrimination. See Pet. Br. 23-24 and *infra*, p. 11.

[4] With the exception of the insignificant detail of the registrant's address demanded by the form.

those required by section 8. Accordingly, the government's reservation is of no consequence.

Section 8 specifically provides that a person who is under a duty to register because of membership in an organization found to be a Communist-action organization shall "register as a member of such organization." Pursuant to this statutory command, the Board ordered each petitioner to "register . . . as a member of the Communist Party of the United States of America" (R. 26, 58).[48] In accordance with section 8 and the Board's orders, the Attorney General adopted a form the execution of which by petitioners would require each of them to state that he "hereby registers as a member of the Communist Party."

The text of section 8 would seem to require a registrant not only to name the organization in which he holds membership but to describe it as a Communist-action organization. Moreover, since the duty to register is predicated on a finding that the organization is a Communist-action organization, recognition of the correctness of the finding is implicit in the act of registering. Accordingly, the Board ordered petitioners to register as members "of the Communist Party of the United States of America, a Communist-action organization" (R. 26, 58). The Attorney General has never objected to this interpretation of section 8 and has adopted it in the registration form which follows the language of the orders. In any case, as the government acknowledges at one point (Br. 17-18), petitioners are obviously entitled to an adjudication of their claims as they relate to the Board's orders as well as to the requirements of section 8.

2. *The merits of petitioners' claims.*

The government points out (Br. 19-20) that the Act differs from registration statutes like the firearms statute (26 U. S. C. 5841) invalidated in *Russell* v. *United States*, 306 F. 2d 402. Legislation of the latter type punishes per-

[48] Orders in this form are also required by sec. 13(g).

sons in a defined class that is linked to criminal conduct for failing to come forward and register themselves as members of the class. Under the Act, on the other hand, the government has the burden of identifying a person as a member of the class before his obligation to register arises. This distinction does not eliminate the Act's vice of compulsory self-incrimination.

The government reasons (Br. 19-21, 26-27) that there is no constitutional objection to compelling admissions which are incriminating on their face if the government is already in possession of the facts to be admitted, since in that event the admission gives the government no new leads and is not genuinely incriminating. By this logic, the statute in *Russell* would have been constitutional as to any person whom the government knew to be in the illegal possession of firearms at the time the duty to register them arose. *Russell* contains no such qualification because, contrary to the government's contention, the privilege protects against *any* disclosure that would link the person making it to an area of criminal activity, whether or not the government is in possession of independent evidence of the link. See Pet. Br. 27-29. There is nothing to the contrary in *Hoffman* v. *United States*, 341 U. S. 479, *Heike* v. *United States*, 227 U. S. 131, or *Mason* v. *United States*, 244 U. S. 362, relied on by the government (Br. 21, 27). They simply stand for the proposition that there must be some recognizable connection between the disclosure which is sought and criminal conduct.[5]

The government also points out (Br. 20, n. 10) that statutes of the *Russell* type "may induce otherwise unwilling members of the class to come forward and register,"

[5] Thus in *Hoffman*, the Court did not think it relevant to inquire whether the government already knew the answers to the questions that Hoffman refused to answer. When it appeared that the answers might have linked him to racketeering, the inquiry was at an end, and his claim of privilege was sustained.

while the Act exerts no coercion in advance of a registration order. This distinction is immaterial. The statute in *Russell* was not invalidated because it improperly induced members of the class to register but because it punished those who refused to register, thereby violating their privilege.

The government states (Br. 21) that Congress did not intend the Act "to pry damaging admissions from unwilling members." The statement is both irrelevant and untrue. It is irrelevant because, whatever Congress may have intended, the Act does, in fact, coerce incriminating admissions of membership in the Communist Party from unwilling persons. The statement is untrue because the text of section 4(f) and its legislative history, detailed in *Scales* v. *United States*, 367 U. S. 203, 210-219, make crystal clear that Congress knew that the member registration requirement would compel persons to make incriminating admissions within the protection of the privilege, but that it was unwilling to grant them the full immunity which *Counselman* v. *Hitchcock*, 142 U. S. 547, requires. In the face of this legislative history, it is ludicrous for the government to assert (Br. 24) that, "It is entirely clear from Section 4(f) of the Act that Congress was not intending to have compulsory registration serve as an admission of any incriminating fact."

The government argues (Br. 22, 29) that registration as a member of the Communist Party is a form of self-identification, "indistinguishable" from fingerprinting and similar non-testimonial acts which, it says are not protected by the privilege. But whatever may be true of fingerprinting or other evidentiary uses of the body of an accused, self-registration is an act of communication and, thus, is indisputably within the protection of the privilege. *Holt* v. *United States*, 218 U. S. 246, 253, on which the gov-

ernment relies (Br. 29), makes this very distinction between communication and evidentiary use of the body.[6]

Again, it is argued (Br. 23) that registration does not constitute an admission of membership but admits only that the registrant "has been found to be a member." This is plainly not so, since the Act, the order of the Board and the registration form all oblige him to register "as a member." See *supra*, p. 5. Moreover, section 8 imposes the duty to register on, "Any individual who *is* . . . a member." Hence, registration, ipso facto, constitutes an acknowledgement of the fact that the registrant *is* (not merely has been found to be) a member.

The Act, therefore, does not permit registrants to add qualifying language to the registration form, as the government now suggests (Br. 23) that they may. Nor does the order of the Board permit this. Contrary to the government's assertion (Br. 23, n. 12) Congress *did* intend "to authorize an administrative agency to extort confessions of wrongdoing," and the agency has done so. Accordingly, the flaw of compelling self-incrimination is in the Act and cannot be cured by revising the orders of the Board, or, as the government suggests (Br. 23), the Attorney General's form.

Finally, the government argues (Br. 24) that any admissions required of a registrant are not incriminating because the rule against the admissibility of involuntary confessions would bar their use against him. This argument stands the privilege on its head. The rule of *Counselman*, which the government accepts, is that an incriminating admission may not be *compelled* without a grant of absolute

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[6] The same distinction disposes of the government's contention (Br. 29) that the disclosures called for by the registration statement may be compelled because they are "no different from the various nontestimonial acts which a criminal defendant may be compelled to perform."

immunity. See Pet. Br. 25-29; G. Br. 25.[7] The Act contains no such grant. Hence it violates the privilege.

The government's disingenuous refusal to recognize the violation of the Fifth Amendment privilege which this case presents is epitomized in the statement (Br. 29) that, "the Act prescribes no more in its present form than if Congress had chosen . . . to allow the Attorney General to 'register' all those found by the Board to be members of Communist-action groups." It is odd that the government must be reminded that the Amendment protects against *self*-incrimination.

B. *The registration statement.*

Since, as we have shown, petitioners may not be required to register with the Attorney General pursuant to section 8(a) and the orders of the Board, they are under no duty to file registration statements pursuant to section 8(c). This follows from the text of 8(c) which provides that registration under 8(a) "shall be *accompanied by* a registration statement." Obviously, a registration statement cannot "accompany" a non-existent registration. The fact that the obligation to file a registration statement is ancillary to the act of registration is borne out by section 15(a) which imposes daily cumulative penalties for failure to register but not for failure to file the statement. This interpretation is also required by the principle of the strict construction of criminal statutes.

We advanced the foregoing construction of section 8(c) in our principal brief (p. 34). Although the government has not replied directly, it states (Br. 29) that a registration statement "does nothing more than identify *the registrant*

[7] The related principle of due process forbids the admission in evidence of coerced confessions. The purpose of this principle is not only to prevent convictions on such evidence but also, like the privilege, to deter an uncivilized practice. *Blackburn* v. *Alabama*, 361 U. S. 199, 206-07. And see Pet. Br. 27.

as the same man found by the Board to be a member of a Communist-action group" (emphasis supplied). But if there is no "registrant," there is no one to identify and the statement is functionless. At another point, the government (Br. 16) speaks of "the Board's power to compel the bare act of registration and the submission of *an accompanying* statement" (emphasis supplied). It would seem, therefore, that the government agrees that the duty to file a statement is imposed only on those wh gister.[8]

If the Court agrees with this interpretation of section 8(c) and sustains petitioners' claims of privilege with respect to the act of registration, the controversy with respect to the registration statements will automatically be disposed of. We will address ourselves nevertheless to the government's contentions on this branch of the case.

The government concedes (Br. 15) that petitioners' claims of privilege with respect to the registration statement are ripe for adjudication, "if all conceivable complying disclosures would violate such a privilege"—i.e., if their privilege would be violated by any demand for information that section 8(c) authorizes the Attorney General to make.

The government nowhere discusses the extent of the Attorney General's authority to demand information under the sweeping terms of section 8(c). Nor does it reply to our contention (Br. 34-35) that the section is an invalid delegation of legislative power and a violation of the Fourth Amendment because the authority of the Attorney General is undefined and unlimited. If section 8(c) can be saved by construction, however, the permissible range of inquiry

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[8] This construction does not attribute to Congress the intention of giving a bonus to persons who refuse to register when ordered to do so. It simply reflects the common-sense view that there is no point in imposing an additional non-cumulative penalty on a person who is already incurring cumulative penalties amounting to life imprisonment for refusal to register.

must be confined to matters reasonably related to the purposes of the Act and the setting in which the inquiry is made. Since the statements are required of persons who have been found to be and ordered to register as members of the Communist Party, the inquiry must be related to the further identification of such persons as Party members or to their activities in that organization.

"The conclusion is inescapable that the Communist Party is sui generis. The legislative array facing the Party virtually makes it a criminal conspiracy per se." *Communist Party* v. *United States*, 331 F. 2d 807, 812. Obviously, a person whom the government has found to be a member of such a conspiracy is privileged to refuse to answer any questions whatsoever that are related to his identity or activity as a member.[9] *Hoffman* v. *United States*, 341 U. S. 479, sustained claims of privilege because (at 488), "In this setting it was not '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." (emphasis in original). No questions conceivably within the authority of the Attorney General under section 8(c) could survive this test.

We turn now from consideration of the questions the Attorney General *could* ask under section 8(c) to those that he has asked on form IS-52. Except for the false analogy to fingerprinting (G. Br. 29; *supra*, pp. 7-8), the government does not defend the inquiries on this form as non-incriminating. It avoids the issue by arguing that petitioners' claims of privilege against answering them (as distinguished from their claims against answering all inquiries within the competence of the Attorney General) is premature.

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[9] We have already discussed the fallacy of the government's contention (Br. 29) that inquiries for the purpose of identification are no different from fingerprinting.

The government acknowledges (Br. 17) that petitioners' privilege with regard to the submission of statements has been distinctly invoked and overruled. It argues however, that petitioners have not specifically claimed the privilege with respect to each question on form IS-52 (Br. 13-14), and it urges that they may do so only on the form itself at the time it is filed (Br. 28).

This, it is said (Br. 13) is because the Attorney General may alter form IS-52 before petitioners are compelled to submit it. But the government does not indicate what non-incriminating questions the Attorney General is authorized to ask in lieu of the questions that appear on the form. And, as we have seen (*supra*, p. 11), there are none. Furthermore, implicit in this contention is the thought that the Attorney General has authority to compel an answer to any inquiry he may see fit to make. But if he has such authority, section 8(c) is unconstitutional as a delegation of legislative power and a violation of the Fourth Amendment. See Pet. Br. 34-35.

Next, it is argued (Br. 13) that petitioner's claims are premature because the Attorney General may accept something less than full compliance with the demands of form IS-52. But the instruction sheet accompanying the form (Pet. Br. 66) specifically states that, "All items of the form are to be answered." If the Attorney General had concluded that some of these items are unauthorized or superfluous, he would have advised petitioners and the Court that he was withdrawing them. Instead, the government's brief (p. 28-29) defends all of the items as akin to fingerprinting.

Rabinowitz v. *Kennedy*, 376 U. S. 605, on which the government relies (Br. 13) is not comparable. There the government acknowledged (at 610) that some of the questions on the registration form were "clearly inapplicable" to the petitioners, and the rules of the Department of Justice, printed on the registration form, permitted a registrant to

apply for a waiver of any of the form's requirements. Here, in contrast, the failure to adjudicate petitioners' claims in this proceeding would compel them to risk five year prison sentences on a speculation as to what might satisfy the Attorney General.

It is also said (G. Br. 13) that the privilege issue is premature because the Attorney General may see fit to honor claims of the petitioners with respect to some of the demands of form IS-52 when made on the form itself. But all of the facts and circumstances on which petitioners rely to support their claims are known to the Attorney General at this time. And the government has already denied petitioners' claims by arguing (Br. 28-29) that none of the items on the form calls for incriminating replies. Hence the claims are ripe for adjudication.

Finally, the government argues (Br. 27-28) that *United States* v. *Sullivan*, 274 U. S. 259, is controlling. *Sullivan* held that a taxpayer could not, on self-incrimination grounds, refuse to file an income tax return but was required to claim his privilege as to particular inquiries on the return itself.

Sullivan differs from the present case in two vital respects. First, the filing of income tax returns is a general obligation applicable to all taxpayers, not one which is addressed only to those suspected or accused of wrongdoing. Under the Act, in contrast, the duty to file registration statements falls only on those who have been singled out by the Attorney General as, and found by the Board to be, members of an organization which Congressional legislation has made virtually "a criminal conspiracy per se." *Communist Party* v. *United States*, *supra*, at 812. Second, because of the neutral setting in which income tax returns are required and the nature of the information they demand, the Court in *Sullivan* could not say *in limine* that all of the inquiries on the return would require self-incrimina-

tion. Here, on the contrary, it is clear that responses to any of the items on form IS-52 might incriminate petitioners. See Pet. Br. 23-24 and *supra*, p. 11.

III. Substantive Due Process.

Our principal brief (pp. 33-35) argued that compulsory registration under the Act violates due process because there is no governmental purpose for this deprivation of personal liberty.

As we have shown above, the government's effort to discover a governmental purpose in the member registration requirement has been fruitless. The government (Br. 31) also argues that, even if purposeless, the requirement is valid because "petitioners are not hurt by [it]."

However, the "liberty" which the constitution protects is the liberty of an individual to do what he pleases. Consequently, he may not be compelled to obey a command of the state unless it serves some legitimate state interest. "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." *Bolling* v. *Sharpe*, 347 U. S. 497, 499-500.

Moreover, it is idle for the government to say that compulsory registration does not "hurt" the registrant. Congress obviously thought otherwise, or it would not have employed cumulative penalties amounting to life imprisonment as the means of enforcing compliance. And, in addition to First Amendment considerations (*infra*, pp. 14-17), the member registration requirement "hurts" by coercing confessions (*supra*, p. 9 and n. 7, and invading privacy.

IV. The First Amendment.

A. Our principal brief (pp. 37-39) showed that the member registration requirement violates the First Amendment because it compels a registrant to make declarations

which are contrary to his conscience and belief, invade his privacy and are self defamatory.

The government's inability to grasp, let alone answer, this point is exemplified by the assertion (Br. 36) that, "If petitioners were asked squarely whether or not they are members of the Communist Party, they . . . would not be heard to claim that a response to the question would be a 'declaration of political belief' which could not be compelled consistently with the First Amendment." The government has evidently forgotten decisions like *Barenblatt* v. *United States,* 360 U. S. 109, where it was only a bare majority of the Court that refused to honor the refusal of a witness, on First Amendment grounds, to answer this very question. The majority acknowledged (at 126) that, "Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships." It concluded (at 134) only that in the case before it, "that the balance between the individual and the governmental interest here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended." Since, in the present case, there is no governmental interest at stake (Pet. Br. 33-34 and *supra,* pp. 1-4), *Barenblatt* requires the balance to be struck in favor of petitioners.

The demand here is worse than that in *Barenblatt.* For here it is not that the individual disclose his political affiliation but is, rather, that he admit, perhaps untruthfully (Pet Br. 35, 38), to a particular affiliation and defame the organization in which he supposedly holds membership. Less obnoxious loyalty oaths have traditionally been resisted on grounds of conscience.

The government's insensitivity to the interests which the Amendment protects is illustrated by the argument (Br. 35) that registration is not "a meaningful declaration

at all," since it is made "under compulsion of a Board order." By this perverse logic, *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, was wrongly decided because the flag salute it invalidated was compulsory.

In like vein the government believes (Br. 34) that the exaction of political avowals is not within the ambit of the First Amendment unless the declarants are also required to "forswear the goals or means of the organizations with which they are associated." It argues (*ibid.*) that the absence of the latter requirement distinguishes this case from *Barnette* and the Labor Board cases cited in Pet. Br. 39. But *Barnette* (at 633) found it irrelevant to determine whether the regulation imposing the flag salute "contemplates that pupils forego any contrary convictions of their own and becoming unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning."

B. Our principal brief (pp. 39-41) showed that the member registration requirement also violates the First Amendment because its restraint on freedom of association is over-broad and cannot find justification in any public interest. The government does not deny that the requirement restrains association. It argues (Br. 36-38) that under *Communist Party* v. *S. A. C. B.*, 367 U. S. 1, the restraint is justified by the need of removing the "mask of anonymity" from Communist Party members.

We believe that the decision in the *Communist Party* case was incorrect and should be reconsidered and overruled. Grounds for that belief are stated in the brief for petitioner and the dissenting opinion of Justice Black in that case, and in the amicus brief for the National Lawyers Guild in this case.

In any event, the *Communist Party* case is inapplicable. The findings and orders of the Board remove the "mask of

anonymity" from those found to be Communist Party members, making their self-registration as such superfluous (Pet. Br. 33-34). And there is no other justification for the self-registration requirement.

V. Procedural due process and the prohibition against bills of attainder.

A. Our principal brief (pp. 42-48) argued that petitioners have been denied due process and subjected to attainder by the provisions of the Act and the ruling of the Board which precluded them from challenging the correctness or current validity of the Board's 1953 determination in the *Communist Party* case that the Party was a Communist-action organization.

The government argues (Br. 40) that it would be impractical to permit relitigation of the Party's status in each member registration proceeding. But constitutional rights cannot be sacrificed to considerations of administrative convenience.

It is also argued (Br. 40-41) that the 1953 status of the Communist Party may be presumed unchanged inasmuch as the organization has not sought to present the Board with evidence of a change. The fact that the Act does not permit an unregistered organization to do so is said to be immaterial (Br. 41) because "the Party chose not to register." What the Party has chosen is to litigate its constitutional right not to be compelled to register—an issue which the majority held premature in the *Communist Party* case (Pet. Br. 45). Certainly, it cannot be required to forego its constitutional right to litigate this issue as the price of securing its constitutional right to seek a redetermination of its status. Still less may the

constitutional rights of the members be denied because the organization has elected to assert its own.[10]

The government says (Br. 42) that the Act is not a bill of attainder merely because it commits the determination of the status of an accused organization to an administrative agency and not to a court. This misconceives our argument (Pet. Br. 45-47) which is that the Act attaints petitioners because it permits them no escape from the Board's 1953 determination of the status of the Communist Party, even though that determination has no current validity. As our principal brief showed (*ibid.*), the Act therefore satisfies the criteria of bills of attainder stated in *United States* v. *Brown*, 381 U. S. 437, and in the *Communist Party* case.

B. Our principal brief (pp. 48-51) showed that the description of a world Communist movement contained in section 2 of the Act, as interpreted by the Board, is anachronistic; that, under the decision in the *Communist Party* case, the Board and the courts are required to notice this fact, and therefore to invalidate the Board's 1953 determination that the Communist Party is a Communist-action organization.

It is no answer to this showing to say (G. Br. 41, n. 19) that the excerpts from authoritative sources contained in our principal brief (pp. 49-50) "are merely personal views on which the Board might pass if they were properly presented at an appropriate hearing." The political realities to which these excerpts refer are matters of common knowledge and, hence, under the *Communist Party* case, must be noticed. Moreover, the Board's ruling (R. 13-14) that petitioners were bound by its 1953 determination establishes

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[10] The government argues (Br. 41) that the Party could have employed some procedure other than that accorded by the Act for a redetermination of its status. But the nature of such a procedure is not indicated and, in fact, there is none.

that, in its view, there is no "appropriate hearing" for consideration of the current realities concerning "the world Communist movement."

VI. The denial of a judicial and jury trial.

Our principal brief (pp. 51-55) showed that, in prosecutions for failure to register, the Act unconstitutionally denies the accused indictment by grand jury, trial by judge and jury, and the requirement of proof beyond a reasonable doubt on the issues of (a) whether the accused is a member of the Communist Party and (b) whether the Party is a communist-action organization.

The government says (Br. 43) that this objection is premature and must await adjudication in a criminal prosecution for failure to register.

The government, however, studiously ignores our argument that under the doctrine of *Ex Parte Young*, 209 U. S. 123, petitioners are constitutionally entitled to have their contentions adjudicated in a civil proceeding before incurring the enormous cumulative criminal penalties which the Act visits on those who violate registration orders.

On the merits of the point, the government is obviously in error in assuming that any or all elements of an offense can be predetermined administratively, leaving for the judicial trial only the question of compliance with the administrative order.

Even for the purposes of imposing a civil sanction, Congress may not commit to the administrative process adjudication of claims of American citizenship. Due process guarantees a *de novo* judicial trial of such claims. *Ng Fung Ho* v. *White*, 259 U. S. 276, 282-84. Nor may a State substitute administrative for judicial adjudication of what constitutes obscene literature for regulatory purposes. *Bantam Books* v. *Sullivan*, 372 U. S. 58, 69-70. Still less can criminal punishment be based on an administrative determination of the vital elements of the offense. This is

the meaning of *Wong Wing* v. *United States*, 163 U. S. 228, and the opinion of Justices Jackson and Frankfurter in *United States* v. *Spector*, 343 U. S. 169 (see our principal Brief 52-53). The *Cox* and *Yakus* cases, on which the government relies (Br. 45), are not to the contrary for reasons stated in our principal brief (p. 54) and overlooked by the government.

The government misinterprets Justice Jackson's opinion in *Spector* in suggesting (Br. 46) that it derived from a doubt as to the availability of judicial review of deportation orders. To the contrary, Justice Jackson pointed out that since such a review is not the same as a criminal trial of the facts, it would not remove the constitutional defect of the self-deportation statute. See 343 U. S. at 179.

By the government's theory, Congress can virtually eliminate the constitutional safeguards of criminal procedure simply by splitting off for exclusive administrative adjudication the vital and controversial elements of a criminal offense. So, for example, Congress could authorize the Internal Revenue Service to determine that a person had received certain income, and make this determination conclusive in a prosecution of the person for failing to include the income in his tax return. Such a proposition is refuted by its mere statement and was rejected in *United States* v. *England*, 347 F. 2d 425, 438-43.

The government's analogy (Br. 44-45) to statutes which provide for court orders requiring compliance with administrative decisions is false. Such orders are commonly enforced by civil contempt. Moreover, the criminal contempt power is *sui generis* and cannot supply a precedent for eliminating the constitutional requisites of criminal prosecutions. *Green* v. *United States*, 356 U.S. 165, 183-87, 189-91, 193-219. Finally, the criminal contempt power could not sustain the infliction without trial by jury of penalties

as severe as those provided by the Act. *United States* v. *Barnett*, 376 U. S. 681.

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